

## Settlement Agreements

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One of the topics discussed in a recent Protest VTC dealt with settlement agreements. I like to pass on to all of you, regardless of what legal discipline you practice, some of our thoughts on settlement agreements learned at the Court of Federal Claims.

Are there limits? How do we craft them for whatever problem is being solved to keep us out of hot water? Or, better yet, to be able to withstand hot water? When does corrective action go sour?

In *FN Manufacturing, Inc. v. United States*, Fed Cl., No. 98-447C, 28 Oct 1998, the court asked whether the contracting agency has the authority to agree to a contract settlement that establishes a contractor's exclusive ownership of technical data, thereby restricting all future procurements involving the data to sole-source purchases. Does this settlement agreement violate the Competition in Contracting Act (CICA)? Luckily, no. The court does not read CICA as preventing the Government from achieving, through settlement, a result with regard to data rights that a court, faced the identical dispute, could itself reach as an adjudicated outcome.

THE PRACTICAL ASPECT: If a court or administrative agency could reach the same result as we reach in a settlement, then the settlement is ok.

Where have settlements gone wrong?

In *Executive Business Media v. U.S.*, 3 F.3d 759 (4<sup>th</sup> Cir. 1993), DOJ, to settle another case brought in the Court of Claims, accepted the offer of the plaintiff to dismiss its suit if DOD would modify a contract to expand it beyond what it was when it was competitively awarded. A potential offeror learned of the settlement and filed an action in district court seeking an injunction. The district court held that the settlement agreement was not reviewable. The circuit court reversed and remanded.

In *Earth Property Services*, B-237742, 90-1 CPD 273 (14 March 1990), the awardee on a family housing firm fixed-price contract was having problems. To resolve the problems, the awardee agreed not to file a claim and the Government agreed to let the awardee out of the old contract and award it a new sole-source cost-plus-award-fee contract. A potential offeror learned of the new contract action and filed a protest. The protest was sustained.

In both cases cited above it is unlikely that a court or an administrative body would have granted the results of the settlement agreements. It is hoped that this little tidbit will help in fashioning settlement agreements or corrective action that will withstand challenges by others.<sup>1</sup>

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<sup>1</sup> For guidance on other worrisome aspects of settlement agreements and corrective action, see *American Marketing Associates, Inc.* B-274454.4, 97-1 CPD 183 (where a protestor who alleged that the settlement agreement was breached) and *Rexon Tech Corp.*, B-243446.2, 81-2 CPD 262 (where corrective action resulted in a sustained case).